

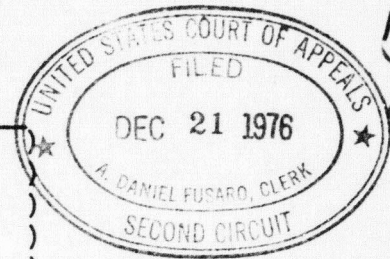
***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

16-4151

IN THE UNITED STATES
COURT OF APPEALS FOR
THE SECOND CIRCUIT



Greene County Planning Board, et al.,
Petitioners
v.
Federal Power Commission,
Respondent
Power Authority of the
State of New York et ano.
Intervenors

Nos. 76-4151
and 76-4153

PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC OF
THE GREENE COUNTY PLANNING
BOARD AND TOWN OF
GREENVILLE

Petitioners Greene County Planning Board and Town of Greenville (collectively hereafter "Greene County") respectfully ask this Court for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure of the decision of this Court* made December 8, 1976 and suggest that this Court hear this matter en banc pursuant to Rule 35.

The decision

1. erroneously overlooks Greene County in its remand to the

*The panel consisted of Circuit Judges Lumbard and Van Graafeiland and District Judge Bonsal.

Federal Power Commission ("FPC") of requests for reimbursement of litigation expenses;

2. ignores, without explanation, the contrary views in this case of Judges Kaufman, Mansfield and Oakes of this Court, of the U.S. Environmental Protection Agency, the U.S. Department of Interior, the U.S. Department of Housing and Urban Development and the New York State Department of Environmental Conservation; and

3. creates a direct inconsistency and conflict with three other recent decisions of other panels of this Court: NRDC v. NRC, _____ F.2d _____, 6 ELR 20513 (2d Cir. 1976), rehearing denied, _____ F.2d _____, 6 ELR 20723; Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975); and NRDC v. Callaway, 524 F.2d 79 (2d Cir. 1975).

The Decision

The decision denied Greene County's petition to review orders of the Federal Power Commission which granted the Power Authority of the State of New York (PASNY) permission to build a high voltage power line (the "Gilboa Leeds line") and other facilities, and which denied Greene County's request that it be reimbursed for its litigation expenses in the FPC proceedings. Over a dissent by Judge Van Graafeiland, the decision remanded to the FPC a request by the Town of Durham and others for their litigation expenses.

Although PASNY applications are currently pending before the FPC for a new power plant to be attached to the western end of the

Gilboa Leeds line and before the U.S. Nuclear Regulatory Commission for another new power plant to be attached to the eastern end of the Gilboa Leeds line, the decision held that it was not necessary for the FPC under the Federal Power Act and the National Environmental Policy Act to consider the cumulative impacts of the entire comprehensive, integrated package of facilities proposed by PASNY and separately, but contemporaneously, before the Federal government for approval.

The decision (slip op. 822) went on to hold that it was proper for the FPC to consider the electrical engineering aspects of the "related contingencies", but that there was "no need" for there to be a parallel consideration of the environmental impacts of the "related plans".

Although the FPC licensed the power line to be upgradable to extra high voltage (765kv), the decision (slip op. 822) held that there was no need at this time to assess the potential environmental impacts of that extra high voltage.

The Decision Overlooks
Greene County on the
Issue of Litigation
Expenses

The decision remands to the FPC a request by the petitioners, other than Greene County, for reimbursement of litigation expenses. However, Greene County is in exactly the same position as the

other petitioners:

(a) Greene County's petition for review asked for this relief and its brief (p.7) expressly adopted the arguments of the other petitioners on this point;

(b) The Record quite clearly shows that Greene County and the other petitioners acted jointly and cooperatively throughout this case, and with equal force, opposed the routing supported by both PASNY and the FPC staff;

(c) PASNY even states (PASNY br. p. 51) that, as to the routing eventually selected by the FPC,

"The Director of Planning
of the Greene County Planning
Board...had a great deal to do
with laying out Route B-1..."

(d) It was at the urging of Greene County (see tr. 6) that the entire conceptual design of the power line was changed from a 400 foot right of way with two parallel sets of towers to a 250 foot right of way with a single upgradable set of towers.

Therefore, Greene County has played the same "essential role in the proceedings" (slip op. 828) and is as every bit as "indigent" as the other petitioners. It is respectfully submitted that this Court overlooked these facts in remanding the request of the other petitioners while denying that of Greene County.

The Decision Completely
Ignores Other Authoritative
Opinions On This Case

The relationship between the Gilboa Leeds line and other related significant electrical facilities has been before this Court three other times. Except to note the citations of those other reviews (slip op. 817, footnote 1), this Court has failed to consider the opinions of the other judges of this Court who have focused on these relationships and found them to be the source of legal rights and duties.

Chief Judge Kaufman in Greene County I, Judge Mansfield dissenting in Greene County II* and Judge Oakes in Greene County III all expressed their views that the Gilboa Leeds line was a mere segment of a larger comprehensive plan of integrated facilities. Judge Mansfield, trying to give effect to Chief Judge Kaufman's earlier opinion which ordered the FPC to prepare a proper environmental statement, opined that the FPC environmental statements which are the subject of this case were fatally deficient because they failed to address the impacts of the whole comprehensive plan:

"That the FPC has failed to prepare the comprehensive impact statement specified by this Court [in Greene County I] is clear." (Greene County II, 490 F.2d at 261).

The U.S. Environmental Protection Agency ("EPA"), the U.S.

*Judges Oakes and Timbers joined with Judge Mansfield in Greene County II in supporting a rehearing en banc in that case. The exact facts and issues presented by Greene County II, but dismissed then as prematurely raised, are presented in the instant case.

Department of Interior, the U.S. Department of Housing and Urban Development and the New York State Department of Environmental Conservation ("DEC") have all taken the position that the FPC erred by segmenting its assessment and treating the Gilboa Leeds line in splendid isolation. In fact, both EPA and DEC were unable even to comment on the FPC draft environmental statement because they found it to be so deficient as to project scope.

The December 8, 1976 decision of this Court does not address any of these other contrary authoritative opinions.

Furthermore, the decision overlooks the facts that the related proposals of PASNY are not speculative or remote, but they are currently pending proposals for related Federal actions in a geographically compact area.

A rehearing is necessary to permit this Court to give consideration to these facts and opinions.

The Decision Creates A
Conflict With Other Recent
Opinions of This Court

Recently this Court in three different cases cited above, NRDC v. NRC, Chelsea Neighborhood and NRDC v. Callaway, has spoken strongly against segmentation of proposals when an environmental assessment under NEPA is at issue. Those cases present three types of contexts:

1. NRDC v. NRC dealt with a Federal program involving a new technology and the attempted development of one facility which was

a part of that program without first analyzing the whole program;

2. Chelsea Neighborhood was a "step transaction" in which one federal facility, a postal garage, was proposed to be built in such a way that Federally assisted housing could later and separately be built above it. This Court held that in "step transactions" the whole chain of Federal actions must be assessed before the first step can be taken.

3. NRDC vs. Callaway was a case involving similar, separate, not necessarily related, actions in a small geographic area which might have a cumulative impact. This Court held that under such circumstances the first such action had to be preceded by an environmental impact statement addressing the cumulative impacts.

The instant Gilboa Leeds line case involves elements of all three of these prior decisions. First, there is a program of activities involving the complex relationship of proposed pumped storage hydroelectric facilities in the Northern Catskills and nuclear generating plants on the Hudson River 35 miles away linked by a high voltage power line. Second, there is the proposal to build a power line upgradable in steps where the last step is 765kv transmission, a qualitatively different type of system. Third, there are contemporaneously pending a number of proposals to build massive electrical facilities under Federal licenses within a relatively small geographic area.

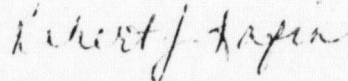
The instant case in every aspect looks much like the prior cases in which this Court has soundly denounced segmentation. But the December 8, 1976 decision in this case goes in another

direction entirely.

We suggest that this case be reheard by this Court en banc to insure uniformity among its decisions.

December 20, 1976

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert J. Kafin".

ROBERT J. KAFIN
Attorney for the
Greene County Planning Board
and Town of Greenville
115 Maple Street
Glens Falls, New York 12801
518-793-6631